



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

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**Matter of:** Global Associates Ltd.

**File:** B-271693; B-271693.2

**Date:** August 2, 1996

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Ross W. Dembling, Esq., and Craig A. Holman, Esq., Holland & Knight, for the protester.

Robert E. Gregg, Esq., Hazel & Thomas, for Grammarians, Inc., the intervenor.

Alan D. Groesbeck, Esq., Department of Agriculture, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

1. Where a proposal, submitted in response to a solicitation, which was issued as a total small business set-aside and included the required "Limitations on Subcontracting" clause, Federal Acquisition Regulation § 52.219-14, is ambiguous as to its compliance with the clause, communications between the agency and an offeror, which resulted in the offeror's submission and the agency's consideration of a five-page document explaining the offeror's approach to complying with the subcontracting limitation, constitute discussions, such that the agency must reopen discussions and allow for the submission of best and final offers.

2. Protest that the agency unreasonably determined that the awardee's proposal was compliant with a request for proposal's "Limitations on Subcontracting" clause, Federal Acquisition Regulation § 52.219-14, constitutes a challenge to the acceptability of the proposal.

3. Protester was prejudiced where the agency conducted discussions with only the awardee after the submission of best and final offers (BAFO) to allow the awardee to revise its unacceptable proposal to make it compliant with "Limitations on Subcontracting" clause, Federal Acquisition Regulation § 52.219-14, because it could have simply rejected the awardee's proposal or allowed the protester the same opportunity to revise its proposal.

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## **DECISION**

Global Associates Ltd. protests the award of a contract to Grammarians, Inc., under request for proposals (RFP) No. WO-96-02, issued by the Forest Service, Department

of Agriculture, for writing, editing, and other services in support of the Forest Service's publications program. Global protests that the agency improperly evaluated its proposal, failed to perform a reasonable price/technical trade-off, and conducted improper post-best and final offer (BAFO) discussions with Grammarians.

We sustain the protest.

The RFP, issued as a total small business set-aside, provided for the award of a fixed-price requirements contract for a base period of 1 year with four 1-year options. The RFP requested the submission of technical and cost/price proposals, and provided detailed instructions for their preparation. The solicitation stated that the award would be made to the responsible offeror whose offer, conforming to the solicitation, represented the best value to the government. The RFP stated that the agency was concerned with obtaining superior technical and management features and thus technical merit was more important than price. The solicitation listed the following evaluation criteria in descending order of importance:

1. Corporate experience
2. Past experience on similar projects
3. Project management
4. Personnel qualifications and experience
5. Familiarity with government publishing standards and regulations

The RFP also included the standard "Limitations on Subcontracting" clause, as set forth at Federal Acquisition Regulation (FAR) § 52.219-14. This clause is required for all solicitations issued as small business set-asides, FAR § 19.508(e), and provides in relevant part as follows:

"(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for--

- (1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern."

The agency received eight proposals by the RFP's closing date of January 25, 1996. The proposals were evaluated by the Technical Evaluation Team (TET), and three proposals, including those submitted by Grammarians and Global, were included in the competitive range. Written discussions were conducted, and BAFOs were requested on February 27 and received on March 5.

The contracting officer states that on February 27, she requested reports from Dun & Bradstreet on each of the three offerors whose proposals had been included in the competitive range. The report on Grammarians, which the contracting officer received on March 5, listed the number of its employees as two, whereas Grammarians's proposed staffing plan for this RFP listed [DELETED] individuals to perform the work. Because the Dun & Bradstreet report indicated that the information was from 1989, the contracting officer requested an updated report. The updated report was received on March 12, and again stated that Grammarians had only two employees.

Because the contracting officer had not read the technical proposals in detail, she asked a member of the TET what Grammarians's proposal provided relating to employees. The TET member recalled that Grammarians had proposed to staff the contract with its own employees, except for certain [DELETED] work which would be subcontracted to [DELETED]. The contracting officer states that at this time she "scanned Grammarians's technical proposal," and found that although "it was obvious that [DELETED] was a subcontractor, [she] could not be certain from the proposal that other staff were not employees."<sup>1</sup>

On March 13, the contracting officer and the TET visited Grammarians's office to assess that firm's ability to perform the contract in accordance with the RFP's statement of work. The contracting officer reports that during this visit the "issue of employees came up" with the president of Grammarians, who stated that "the staff were not actually employees, but were independent contractors." The contracting officer asked the president if she were aware of the RFP's Limitations on Subcontracting clause, and that when the clause was "looked up" on Grammarians's copy of the RFP, the contracting officer reports, Grammarians had "highlighted" the clause and placed "a question mark" by it.

On March 15, the contracting officer contacted the president and requested that Grammarians furnish "clarification that would indicate [Grammarians's] compliance with the subcontracting limitation." A five-page document was received by the contracting officer from Grammarians later that day, which stated, among other things, that Grammarians was "[DELETED]." The contracting officer did not provide the document to the TET, and Grammarians's proposal was not rescored after its receipt. The contracting officer reports that she found, based upon her review of the document, that "Grammarians was aware of the subcontracting clause and intended to comply."

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<sup>1</sup>Our review of Grammarians's proposal shows that because of its proposed use of independent contractors as subcontractors, in addition to its use of [DELETED], the proposal evidenced that Grammarians would likely not comply with the Limitations on Subcontracting clause.

Grammarians's BAFO was rated at [DELETED] out of 100 technical points at an evaluated price of \$1,025,282, and Global's BAFO was rated at [DELETED] points at an evaluated price of \$[DELETED].<sup>2</sup> The agency determined that Grammarians's proposal reflected the best value to the government, and made award to that firm on March 26.

Global protests that the communications between the agency and Grammarians as to whether Grammarians's proposal complied with the RFP's subcontracting limitation constituted improper post-BAFO discussions.

Discussions occur when the government communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or provides the offeror with an opportunity to revise or modify its proposal. FAR § 15.601; Strategic Analysis, Inc., B-270075; B-270075.4, Feb. 5, 1996, 96-1 CPD ¶ 41. In contrast, clarifications are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal and do not give an offeror the opportunity to revise or modify its proposal. FAR § 15.601; Unitor Ships Serv., Inc., B-245642, Jan. 27, 1992, 92-1 CPD ¶ 110. If a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range, whereas clarifications may be requested from just one offeror. Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37.

We agree with the protester that the communications of the agency and the awardee as to the employment status of Grammarians's proposed staff to assure compliance with the Limitations on Subcontracting clause constituted discussions. The contracting officer concedes that in her view it was not clear from Grammarians's proposal whether the personnel proposed were employees of Grammarians, and the agency states in its supplemental report that Grammarians's "technical proposal was ambiguous" with regard to its compliance with the subcontracting limitation. Nevertheless, the agency asserts that because Grammarians's proposal, although ambiguous, did not "unequivocally take exception to the requirement limiting subcontracting," Grammarians post-BAFO statement of how it intended to comply with this clause did not constitute discussions.

From our review, Grammarians's proposal evidences that Grammarians's staffing approach would not comply with the Limitations on Subcontracting clause. For example, the proposal states that Grammarians has a total of [DELETED] employees, specifies that "Grammarians operates [DELETED]," and refers to [DELETED]." Moreover, Grammarians confirmed in its post-BAFO discussions with the agency that its proposal contemplated [DELETED].

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<sup>2</sup>The third offeror's BAFO was lower rated and higher priced than the BAFO of either Grammarians or Global.

In any case, regardless of whether Grammarians's proposal clearly took exception to the Limitations on Subcontracting clause or was merely ambiguous in this regard, the post-BAFO communications with Grammarians were necessary to ascertain whether Grammarians proposed to comply with the subcontracting limitations, that is, whether Grammarians proposed to comply with a material requirement of the RFP and thus whether its proposal was technically acceptable. See Mine Safety Appliances Co.; Interspiro, Inc., B-247919.5; B-247919.6, Sept. 3, 1992, 92-2 CPD ¶ 150 (award improper where the awardee's proposal does not explicitly show compliance with a material requirement and there is reason to doubt that the offeror is agreeing to meet the requirement); National Medical Staffing, Inc.; PRS Consultants, Inc., 69 Comp. Gen. 500 (1990), 90-1 CPD ¶ 530 (award based on proposal which indicated noncompliance with the subcontracting limitation was improper). The communications between the agency and Grammarians thus constituted discussions as they involved the exchange of information necessary to determine the acceptability of Grammarians' proposal. FAR § 15.601; Strategic Analysis, Inc., *supra*.

The agency and Grammarians argue that an agency's consideration of whether an offeror is capable of complying or whether the offeror actually complies with the subcontracting limitation are matters of responsibility or contract administration, respectively (issues not for consideration by our office absent circumstances not present here, Bid Protest Regulations, 4 C.F.R. § 21.5(a) and (c) (1996)), and because of this, any communications concerning the subcontracting limitation cannot properly be considered discussions. See CH2M Hill, Ltd., B-259511 *et al.*, Apr. 6, 1995, 95-1 CPD ¶ 203.

As a general matter, a contracting officer's judgment as to whether a small business offeror will comply with the subcontracting limitation is a matter of responsibility, and the contractor's actual compliance with the provision is a matter of contract administration. See Corvac, Inc., B-254757, Jan. 11, 1994, 94-1 CPD ¶ 14; American Bristol Indus., Inc., B-249108.2, Oct. 22, 1992, 92-2 CPD ¶ 268; Little Susitna, Inc., B-244228, July 1, 1991, 91-2 CPD ¶ 6. However, the protest allegation here challenges the agency's determination that Grammarians's proposal was acceptable, and is based upon the representations in the proposal which, as the agency concedes, make it at best unclear as to whether the proposal complied with the subcontracting limitation. Protests such as this, which are directed at the awardee's proposal, challenge the reasonableness of the agency's determination of technical acceptability rather than the offeror's responsibility. National Medical Staffing, Inc.; PRS Consultants, Inc., *supra* (proposal which indicated noncompliance with the subcontracting limitation should have been rejected as technically unacceptable); Signal Corp., B-241849 *et al.*, Feb. 26, 1991, 91-1 CPD ¶ 218 (award properly made to offeror whose proposal established compliance with subcontracting limitation). Accordingly, the agency's post-BAFO communications with Grammarians regarding

its proposal and the subcontracting limitation, which were necessary in order to determine the acceptability of the proposal, constituted discussions.

The agency contends that, in any event, Global was not prejudiced by the agency's post-BAFO communications with Grammarians. The agency argues that Global has failed to demonstrate that it was prejudiced by the agency's actions because Global has not shown "that without the communications between [the] Forest Service and Grammarians regarding the Limitations on Subcontracting clause, there was a reasonable likelihood that Global would have been awarded the contract." See Data General Corp., 78 F. 3d 1556, 1562 (Fed. Cir. 1996) (" . . . to establish prejudice, a protester must show that, had it not been for the alleged error in the procurement process, there was a reasonable likelihood that the protester would have been awarded the contract.").

Competitive prejudice is an essential element of every viable protest. Diverco, Inc., B-259734, Apr. 21, 1995, 95-1 CPD ¶ 209. Absolute proof of prejudice is not required. Where an agency violates procurement requirements, we have traditionally considered a reasonable possibility that the protester would have otherwise been the successful offeror as a sufficient basis for sustaining a protest. Alliant Techsystems, Inc.; Olin Corp., B-260215.4; B-260215.5, Aug. 4, 1995, 95-2 CPD ¶ 79; Foundation Health Fed. Servs., Inc.; QualMed, Inc., B-254397.4 et al., Dec. 20, 1993, 94-1 CPD ¶ 3; The Jonathan Corp.; Metro Mach. Corp., B-251698.3; B-251698.4, May 17, 1993, 93-2 CPD ¶ 174, aff'd, Moon Eng'g Co., Inc.-Recon., B-251698.6, Oct. 19, 1993, 93-2 CPD ¶ 233.

Here, it is clear from the record that Global was prejudiced by the agency's improper post-BAFO discussions with Grammarians because its BAFO, as submitted, could not properly have been accepted for award. As discussed above, Grammarians's BAFO on its face showed noncompliance with a mandatory clause of the RFP which could not be waived, and became arguably acceptable only because of the post-BAFO communications.<sup>3</sup> If the agency had rejected Grammarians's proposal, instead of conducting the improper post-BAFO discussions only with Grammarians, Global would have been in line for award. In such a situation, we believe that the conduct of post-BAFO discussions with the selected offeror, as opposed to simply rejecting the awardee's proposal, constitutes prejudice

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<sup>3</sup>We cannot ascertain, from this record, whether Grammarians's post-BAFO explanation of how it intended to comply with the subcontracting limitation was acceptable.

to the protester.<sup>4</sup> Smithkline Beecham Pharmaceuticals, N.A., B-252226.2, Aug. 4, 1993, 93-2 CPD ¶ 79. Based on the foregoing, we think it is clear that had the agency not conducted post-BAFO discussions with Grammarians, or instead had provided Global with the same opportunity as Grammarians (that is, another round of discussions to revise its proposal), Global might well have received the award. See 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936; B-251936.2, May 13, 1993, 93-1 CPD ¶ 420.

Accordingly, we recommend that the agency reopen discussions and request BAFOs.<sup>5</sup> If the agency ultimately determines that Global's offer is more advantageous than the offer submitted by Grammarians, the agency should terminate Grammarians contract and award the contract to Global. We also recommend that the protester recover the cost of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1996). The protester should submit its certified claim for costs directly to the agency within 90 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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<sup>4</sup>We also note that the agency failed to consider the impact of Grammarians's post-BAFO statements on that firm's technical score. As mentioned previously, Grammarians's staffing approach was premised on [DELETED]. For example, the agency specifically noted in documenting the selection of Grammarians for award that Grammarians "[DELETED]." However, Grammarians's post-BAFO promise to [DELETED]. This was never evaluated by the agency. Based on our review, if Grammarians's revised staffing approach had been evaluated, its technical score might have been lower.

<sup>5</sup>Global also raised a number of other protest allegations, in particular that the agency improperly evaluated its proposal and failed to perform a reasonable price/technical trade-off. In view our recommendation, we need not decide Global's other allegations since these matters can be resolved during discussions and during the agency's source selection. See Raytheon Co., supra.